COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. BRCV2008-01429A

JOHN DaROSA, JOHN DAY,
DIANE COSMO, LUIS BARBOSA, and
ERMELINDA BARBOSA,

Plaintiffs,

v.

CITY OF NEW BEDFORD,

Defendant and
Third Party Plaintiff.

THIRD PARTY DEFENDANT CORNELL-DUBILIER ELECTRONICS, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Nothing in the Opposition of the City of New Bedford (the "City") is sufficient to stave off dismissal of its claims against Cornell-Dubilier Electronics, Inc. ("CDE"). Confronted with the legal deficiencies in its claims, the City responds with little more than a lengthy verbatim recitation of the allegations in its Amended Third Party Complaint. Rehearsal of the allegations cannot repair their fatal defects. In the end, none of the City's claims can survive.

ARGUMENT

I. The Products Liability Claims.

The City baldly asserts that it has pled "sufficient facts" for a products liability claim but makes no attempt whatsoever to respond to CDE's demonstration that disposal of waste at a dumpsite cannot give rise to a products liability claim. Opposition, pp. 10-11. As the City's silence in the face of this demonstration makes plain, sending waste to a landfill for disposal does not qualify as putting a usable product into the stream of commerce or otherwise give rise to a products liability claim. The logic of the City's position is that CDE designed its waste as a product, which then failed to perform as intended. This is obviously preposterous. *See* M.G.L.

c. 106 §§ 2-314 - 2-318; *Mason v. General Motors Corp.*, 397 Mass. 183, 187 (1986). The City's products liability claims, Counts V, VII and VIII of the Amended Third Party Complaint, should be dismissed.[1]

II. The Chapter 93A Claim.

The City's Chapter 93A claim (Count XVI) boils down to the proposition that every Chapter 21E claim is *per se* a Chapter 93A claim. Opposition, p. 15. In support of this argument, the City cites a single Superior Court decision, *Meguid v. Atlantic Petroleum Corp.*, 2 Mass. L. Rep. 255 (Mass. Super. 1994). However, subsequent cases have repeatedly rejected the notion that a Chapter 21E violation constitutes a *per se* violation of Chapter 93A. *A.J.P. Contractors, Inc. v. Hoch*, 2008 WL 4448184, *3 (Mass. App. Div. 2008) (holding that a company's violation of 21E was not a Chapter 93A violation because the company's conduct was not unfair or deceptive, and did not rise to the level of conduct involving dishonesty, fraud, deceit or misrepresentation to support a Chapter 93A claim); *cf. Swenson v. Yellow Transp., Inc.*, 317 F. Supp. 2d 51, 55 (D. Mass. 2004) ("the case law is clear that a statutory violation is not a per se violation of Chapter 93A"); *Dow v. Lifeline Ambulance Service, Inc.*, 1996 WL 1186916, *1-2 (Mass. Super. 1996).[2] It especially makes no sense to suggest that a violation of Chapter

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[1] The City asserts that its products liability claims may be brought despite a lack of privity with CDE. Opposition, p. 10. The City notes that the law was changed prospectively to permit claims without privity where the injury occurred after the 1973 amendment of G.L. c. 106, § 2-318. *Thayer v. Pittsburgh-Corning Corp.*, 45 Mass. App. Ct. 435, 439 (1998); Opposition, p. 10. However, the City's own statements make clear that the injuries on which it sues occurred *before* 1973. Amended Third Party Complaint, ¶ 52. Hence, the City's products liability claims must be dismissed for lack of privity.

[2] In *Dow*, then Superior Court Judge Cowin explained the absurdity of the argument advanced by the City: "Were the Court to accept the plaintiffs' argument that the violation of any Massachusetts statute or regulation automatically constitutes a violation of chapter 93A under Attorney General's regulations at 904 Code Mass. Regs. § 3.16(3), chapter 93A would immediately become the preeminent law of the Commonwealth, replacing all other forms of civil liability. The advantage provided by the option of double or treble damages and awards of attorneys fees granted successful consumer plaintiffs in business situations would be granted to all plaintiffs in all situations. Without clearer indication from the Legislature that this result is desirable and just, the Court cannot engage in such a radical rewriting of Massachusetts jurisprudence." *Id.* at *2.

21E is *per se* an unfair and deceptive practice when, as here, the alleged shipments of waste which might give rise to retroactive liability under Chapter 21E took place over a decade prior to the enactment of Chapter 21E in 1983.[3]

III. The Negligence Claim.

Conceding that it must establish that CDE knew or should have known that the harm from its waste was foreseeable to make out a negligence claim, the City tries to get around its failure to plead that CDE knew or should have known of the harm of the alleged hazardous materials in its waste by strangely arguing in its Opposition that Monsanto knew of the harm of those hazardous materials, so it can be inferred that CDE knew as well. Opposition, p. 6. Allegations in a brief cannot substitute for allegations in a complaint. Whatever is alleged about Monsanto, the City simply has not alleged sufficient facts in its Amended Third Party Complaint to show that CDE owed it a duty of care.

With respect to the statute of limitations, it is the City's knowledge that is at issue. Even giving the City the benefit of the "discovery rule" cannot save the City's negligence claims from being time barred. The City has not made its case that the accrual date was after October 24, 2005 (three years before the filing of the City's original complaint). The City admits that it knew that the Site was contaminated with PCBs and other hazardous materials before October 2005. Answer Of Defendant City Of New Bedford To Plaintiff's First Amended Complaint And Jury Claim ¶¶ 8 and 9. Well over three years before the original Complaint in this action was filed

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[3] In its moving papers, CDE noted that the City's Chapter 93A claim failed to comply with the statutory prerequiste under Section 9 of a formal demand letter. The City has now sent a formal demand letter, which only confirms that its Chapter 93A claim was deficient. In any event, the City has not shown that it has standing as a consumer or business to assert a Chapter 93A claim. In the cases cited by the City, there is a clear commercial transaction which links the municipality and the Chapter 93A defendant. *Norwood v. Adams-Russell Corp.*, 406 Mass. 604, 605 (1990) (license in the form of a bilaterally negotiated contract); *City of Boston v. Aetna Life Ins. Co.*, 399 Mass 569, 571 (1987) (insurance policy). In this case, the City has not alleged any such commercial relationship with CDE.

the City knew not only of its environmental injury but also knew that the source of that injury came from parties that had sent waste for disposal to the Parker Street Landfill. Such knowledge was more than adequate to trigger a duty of inquiry and commence the running of the three year statute of limitations. *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 210 (1990); *Hendrickson v. Sears*, 365 Mass. 83, 91 (1974).[4]

IV. Chapter 21E Claim.

The City's belated "substantial compliance" with the Section 4A demand letter requirement cannot salvage the City's Chapter 21E claims (Counts X and XV). This is not a standard third party claim. The City has turned a garden variety claim regarding the discrete issue of cleanup costs at three neighboring residential properties into a multiparty litigation regarding a large complex state Superfund site. Allowing the City to circumvent the Section 4A process would be contrary to the very purpose of that section — to encourage out-of-court resolution of Chapter 21E claims. M.G.L. c. 21E, § 4A; *Rudnick v. Hosp. Mortgage Group, Inc.*, 951 F. Supp. 7, 9 (1996). The City's 21E claims should be dismissed as premature, particularly where the City has failed to provide CDE with the critical information CDE requested to enable it to evaluate whether its waste was indeed sent to the Site.

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[4] The City cites cases which explain that the limitations period begins to run when a "reasonably prudent person, in the [Plaintiff's] position" knew or should have known about the cause of his injury and "the standard for evaluating whether a plaintiff's lack of knowledge is objectively reasonable is not that of a particular plaintiff, but that of a 'reasonable person.'" Opposition, p. 7. Strangely, the City ignores the holdings of those cases just two pages later, when it improperly argues that the discovery rule requires an assessment of "the City's state of mind or knowledge." Opposition, p. 9. It is well settled law that the standard for evaluating a plaintiff's knowledge of his claim for the purposes of the statute of limitations is an objective standard. *Riley v. Presnell*, 409 Mass. 239, 245 (1991); *Malpanais v. Shirazi*, 21 Mass. App. Ct. 378, 383 (1986).

CONCLUSION

For the foregoing reasons and the reasons set forth in its original moving papers, Cornell-Dubilier Electronics, Inc. respectfully requests that the Court dismiss all claims in this action against it.

Respectfully submitted,

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Dated: June 14, 2010

CERTIFICATE OF SERVICE

I, Rebecca L. Puskas, hereby certify that on this date I caused a true and correct copy of the foregoing to be served via first-class mail, postage prepaid, upon counsel of record to:

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